INDEX.

	PAGE
The Proceedings and Decision of the Lower Court	1
1. The District Court	1
2. The Circuit Court of Appeals	2
The Question Presented	2
FIRST POINT. The Circuit Court of Appeals misinterpreted and misapplied the decision of this Court in the *Slocum* case, and gave to it a construction inconsistent with other decisions of this Court, of Circuit Courts of Appeals in other circuits and its own recent decisions	3
SECOND POINT. The decision of the Circuit Court of Appeals is contrary to the strictly limited interpretation placed upon the *Slocum* case by subsequent decisions of this Court and lower Federal tribunals	13
THIRD POINT. The *dictum* of the *Slocum* decision that compulsory non-suits were unknown to the common law and therefore not permitted in Federal courts under the Seventh Amendment, should not be adopted as a rule of law by this Court	18
1. The *dictum* is *contra* to controlling decisions of this Court which have been followed and applied by lower Federal courts	19
2. Adoption of the *dictum* as law will introduce patent inconsistency into the rules of Federal Trial Procedure	22
3. The *dictum* has no substantial foundation in the Common Law	25
FOURTH POINT. The District Court erroneously denied petitioner's motion to dismiss the complaint for lack of proof	26
1. The conceded and undisputed facts	27

PAGE

2. Respondent's own medical testimony failed to show any causal connection between the alleged injury and the amputation 28

3. At the close of the entire case, the evidence was simply overwhelming in favor of petitioner on the issue of proximate cause 31

LAST POINT. The judgment of the Circuit Court of Appeals should be modified by eliminating therefrom the requirement of a new trial and substituting therefor a direction to enter judgment dismissing the complaint 34

TABLE OF CASES:

Bail v. *New York, New Haven & Hartford Railroad Co.*, 201 N. Y. 355 8

Board of Commissioners of City & County of Denver v. *Home Savings Bank*, 200 Fed. 28 20

Boudrot v. *Cochrane Chemical Co.*, 110 Fed. 919 19

Bright v. *Enyon*, 1 Burrow 390 25

Bulkley v. *Butler*, 2 B. & C., 434 24

Burden et al. v. *Robertson*, 7 F. (2d) 266 20

Capital Traction Co. v. *Hof*, 174 U. S. 1 (1889)..... 15

Castle v. *Bullard*, 23 Howard 172 (1859) 19

Central Transportation Co. v. *Pullman's Palace Car Co.*, 139 U. S. 24 (1891) 5, 6, 19

Chicago & Northwestern Railway Co. v. *Andrews*, 130 Fed. 65 20

Clemence v. *Hudson & M. Ry. Co.*, 11 F. (2d) 913..... 6

Colt v. *Sixth Ave. R. R. Co.*, 49 N. Y. 671 .....31, 33

Coughran v. *Bigelow*, 164 U. S. 301 (1896).....5, 6, 19, 26

Crane v. *Morris*, 6 Pet. 598 (1832) 19

Dulion v. *S. A. Lynch Enterprise Finance Corporation*, 53 F. (2d) 137 20

Ellerson v. *Grove et al.*, 44 F. (2d) 493 20

Elmore v. *Grymes*, 1 Pet. 469 (1828) 19

PAGE

Fadley v. *Baltimore & Ohio R. Co.*, 153 Fed. 514 20
Fitzgerald v. *Colt-Stewart Motor Co.*, 231 App. Div. 176 8
Francisco v. *Chicago & Alton Ry. Co.*, 149 Fed. 354 11

Gasoline Products Inc. v. *Champlin Refining Co.*, 283 U. S. 494 (1931) 15, 16, 17
Gentry v. *Singleton*, 128 Fed. 680 20
Georgia v. *Brailsford*, 3 Dallas 1 (1794) 24
Gibson v. *Hunter*, 2 H. Bl. 187 24
Glynn v. *Krippner*, 47 F. (2d) 281 13
Glynn v. *Krippner*, 60 F. (2d) 406 13
Grace v. *Fassoit*, 67 App. Div. 443 33

Hoffman v. *American Mills Co.*, 288 Fed. 768 10
Hoffman v. *American Mills Co.*, 263 U. S. 701 (1923) 10
Huntt v. *McNamee*, 141 Fed. 293 20

Isaacson v. *United States*, 3 Fed. Supp. 350 14
Italian Star Line, Inc. v. *United States Shipping Board Emergency Fleet Corporation*, 41 F. (2d) 382 8
Italian Star Line, Inc. v. *United States Shipping Board Emergency Fleet Corporation*, 53 F. (2d) 359 ..... 7, 8

Julius Klugman's Sons, Inc. v. *Oceanic Steam Navigation Co.*, 42 F. (2d) 461 20

Knight v. *Illinois Central Railroad Co.*, 180 Fed. 368 ..... 11, 20
Kraus v. *Birnbaum*, 200 N. Y. 130 ..... 31, 33

MacLachlan v. *Perry*, 68 F. (2d) 769 20
McNabb v. *Virginian Ry. Co.*, 55 F. (2d) 137 20
Migel v. *Hirsch & Co.*, 151 App. Div. 637 ..... 31, 33

Neil Bros. Grain Co. v. *Hartford Fire Ins. Co.*, 1 F. (2d) 904 20
New York Life Insurance Co. v. *Slocum*, 177 Fed. 842 4
Noble v. *C. Crane & Co.*, 169 Fed. 55 30

Oscanyon v. *Arms Co.*, 103 U. S. 261 (1880) 23
Ozagar v. *Pierce Mfg. Co.*, 134 App. Div. 800 ..... 31, 33

Parks v. *Ross*, 11 How. 362 (1850) 24
Parks v. *Southern Railway Co.*, 143 Fed. 276 ..... 20, 21

PAGE

Parsons v. *Bedford*, 3 Pet. 433 (1830) 15
Pedersen v. *Delaware, Lackawanna & Western R. R.*, 229 U. S. 146 (1913) 9
Pennsylvania Railroad Co. v. *Chamberlain*, 288 U. S. 333 (1933) 9, 22
Pleasants v. *Fant*, 22 Wall. 116 (1874) 9, 22, 24, 32
Priestly v. *Provident Savings Co.*, 112 Fed. 271 ..... 19, 20
Redman v. *Baltimore & Carolina Line, Inc.*, 70 F. (2d) 635 ..... 1, 2
Royal Card & Paper Co. v. *Dresdner Bank*, 27 F. (2d) 791 7
Russo-Chinese Bank v. *National Bank of Commerce*, 187 Fed. 80 20
Shank v. *Great Shoshone & Twin Falls Water Power Co.*, 205 Fed. 833 20
Slocum v. *New York Life Insurance Co.*, 228 U. S. 364 (1913) 2, 3, 4, 5, 6, 7, 9, 12, 13, 14, 15, 16, 17, 18, 25
Stapleton v. *Reading Co.*, 26 F. (2d) 242 20
Swift & Co. v. *Johnson*, 138 Fed. 867 ..... 9, 20
United States v. *Monson*, 1 Gall. 5 (1812) 23
Viner v. *Corporation of Reading*, 1 Y. & J. 4 24

STATUTES CITED:

Conformity Act (Revised Statutes, Section 914; 28 United States Code Annotated, Section 724) 8, 33
New York Civil Practice Act, Section 459 8
New York Civil Practice Act, Section 482 33

TREATISES CITED:

Blackstone's Commentaries, Volume 3, page 388 25
Schofield, New Trials and the Seventh Amendment, 8 Ill. Law Review, 305 26
Select Essays on Anglo-American History, Volume 1, page 367 24
Warren, History of the American Bar 24

Supreme Court of the United States

OCTOBER TERM, 1934—No. 178.

BALTIMORE & CAROLINA LINE, INC.,

Petitioner,

—against—

DONALD REDMAN,

Respondent.

BRIEF FOR THE PETITIONER.

This cause is before the Court on writ of *certiorari*, granted October 8, 1934, on the petition of Baltimore & Carolina Line, Inc., for review of that part of the decision of the Circuit Court of Appeals for the Second Circuit, reported in 70 F. (2d) 635, denying a dismissal of the complaint without prejudice and remanding the case for a new trial, after reversing a judgment entered on a jury verdict in favor of the respondent, in the District Court for the Southern District of New York, on the 7th day of April, 1933. The proceedings in the District Court are not reported.

The Proceedings and Decisions of the Lower Courts.

1. *The District Court.*

Suit was brought to recover damages for the loss of a leg suffered by respondent, a ship's cook, on the theory that he contracted gangrene necessitating amputation as a result of running his foot into a nail in a wooden slat lying on the petitioner's vessel *Frances Weems.*

The trial resulted in a jury verdict for the respondent.

Upon the trial, at the close of respondent's case and again at the end of the entire case, motions were made by

petitioner to dismiss the complaint for lack of proof (R., pp. 142-145, fols. 174-178; p. 242, fol. 295).

At the close of the entire case, petitioner also moved for the direction of a verdict (R., p. 242, fol. 295).

The District Court reserved decision of these motions until the jury had returned its verdict, when each motion was separately denied (R., p. 145, fol. 178; p. 242, fol. 295; p. 260, fols. 319-320).

Petitioner's motion to set aside the verdict was likewise denied (R., p. 260, fol. 320).

Appropriate exceptions were duly taken in each instance (R., p. 260, fol. 320).

2. *The Circuit Court of Appeals.*

Upon appeal it was contended by petitioner that the denial of these motions by the District Court constituted reversible error. It was urged further, that if the Circuit Court of Appeals should find that the complaint should have been dismissed at any stage of the proceedings below, the judgment should be reversed, and the District Court directed to enter judgment dismissing the complaint *without prejudice:* that is, for lack of proof.

The Circuit Court of Appeals, after reviewing the evidence, reversed the judgment below and remanded the case for a new trial.

In doing so, it said (p. 638):

> "We have no power to direct a dismissal without prejudice, as the appellant urges. *Slocum* v. *N. Y. Life Ins. Co.*, 228 U. S. 364."

The Question Presented.

The question presented on this appeal is as follows:

> Under the Seventh Amendment to the Constitution of the United States, may a Federal Appellate

Court, in reversing a judgment entered upon a jury verdict in a Federal District Court, direct the lower court to enter judgment dismissing the complaint without prejudice, where the proofs failed to establish a cause of action and the trial court reserved decision of motions to dismiss the complaint (made at the close of the plaintiff's case and at the close of the entire case) until after a verdict for the plaintiff, and then erroneously denied said motions?

If the question is answered affirmatively, this Court may then decide whether the District Court should have dismissed the complaint for lack of proof; and if so, modify the order of the Circuit Court of Appeals accordingly.

FIRST POINT.

The Circuit Court of Appeals misinterpreted and misapplied the decision of this Court in the *Slocum* case, and gave to it a construction inconsistent with other decisions of this Court, of Circuit Courts of Appeals in other circuits and its own recent decisions.

The Circuit Court of Appeals for the Second Circuit has answered the question presented in the negative, upon the authority of a decision by a bare majority of this court in *Slocum* v. *New York Life Insurance Company*, (228 U. S. 364), decided April 21, 1913. In doing so, the Court has misinterpreted and misapplied the precedent referred to, which has no application to the situation presented by the case at bar.

The *Slocum* case was a suit at law brought in the Circuit Court for the Western District of Pennsylvania to recover the proceeds of a life insurance policy. At the conclusion of all the evidence, the defendant moved for a

directed verdict. The motion was denied, and the case was submitted to the jury, which rendered a verdict for the plaintiff. Thereupon, pursuant to Pennsylvania state practice, the defendant made a motion for judgment *non obstante veredicto,* which was denied. Upon appeal, the judgment entered on the verdict was reversed, and the court below was directed to enter judgment for the defendant notwithstanding the verdict. (*New York Life Insurance Company* v. *Slocum,* 177 Fed. 842, 849.)

The plaintiff appealed to this Court, which decided that, while the Circuit Court of Appeals had not erred in reversing the judgment, it was powerless under the Seventh Amendment to direct judgment for the defendant on the evidence and was limited to remanding the cause for a new trial.

Substantial distinctions exist between the *Slocum* case and the case at bar. There, the Seventh Amendment was held to have been violated because the appellate court "assumed to pass *finally upon the issues of fact presented by the pleadings* and to direct a judgment accordingly" (p. 376). Here, the Circuit Court of Appeals was not asked to decide *finally any issue of fact,* but was called upon to declare that *no triable issue of fact was presented by the evidence* and to dismiss the complaint *without prejudice.* There is a patent difference between substituting the decision of an appellate court for the determination by a jury of a disputable question of fact, and holding that the facts adduced on the trial as matter of law presented no triable issue for the jury to determine.

The *Slocum* case recognizes this very distinction (pp. 394-395):

> "In what has been said we would not be understood as implying that a motion for a compulsory nonsuit and a demurrer to the evidence are equivalents of a request for a directed verdict, for while they are sometimes spoken of as analogous to it,

this only means that for the purpose of each the evidence must be taken most strongly in favor of the opposite party. In other respects they are essentially unlike. *A motion for a compulsory nonsuit looks to an arrest of the trial and a dismissal of the cause, leaving the merits undetermined and the plaintiff free to sue again,* while a request for a directed verdict looks to a completion of the trial and an adjudication of the merits through the accustomed cooperation of the court and jury." (Italics ours.)

The prevailing opinion (pp. 395-397) refers to the cases of *Central Transportation Co.* v. *Pullman's Palace Car Co.* (139 U. S. 24), and *Coughran* v. *Bigelow* (164 U. S. 301) and, concerning these precedents, remarks (pp. 396-397):

"Although they hold, one by implication and the other expressly, *that the constitutional right of trial by jury is not invaded by a statute authorizing the court to enter a compulsory nonsuit against a plaintiff for an insufficiency in his evidence, when he is not thereby prevented from suing again on the same cause of action,* they neither hold nor suggest that, consistently with that right, the court can refuse to take the verdict of the jury, or disregard it when taken, and enter a binding judgment on the evidence." (Italics ours.)

The court expressly declined to say whether these decisions "should be accepted and followed in respect of the particular matter to which they are addressed, that is, the granting of an involuntary nonsuit which leaves the merits unadjudicated" (p. 397).

Thus the *Slocum* case is not determinative of the question here presented; the opinion there expressed by the majority (pp. 392-394) that a compulsory nonsuit was unknown to the common law, and therefore not permitted in

Federal courts, is mere *obiter dicta*, without binding force, and directly *contra* to the decisions of this Court in *Central Transportation Co.* v. *Pullman's Palace Car Co.* (139 U. S. 24) and *Coughran* v. *Bigelow* (164 U. S. 301); and the Circuit Court of Appeals was unwarranted in applying the decision as a conclusive precedent to the instant case.

The distinction between a nonsuit and a directed verdict was likewise recognized by the Circuit Court of Appeals for the Second Circuit in *Clemence* v. *Hudson & M. Ry. Co.* (11 F. (2d) 913). Suit was there brought under the Employers' Liability Act to recover damages for personal injuries. Before verdict, the defendant moved for a nonsuit, the motion was denied, and a verdict rendered for plaintiff. Thereafter, the trial court set aside the verdict, directed a verdict for the defendant, and entered judgment on it, dismissing the complaint *on the merits*.

In reviewing this action by the trial court, the Circuit Court of Appeals, through Hand, *J.*, commented (p. 915):

> "The trial judge set aside the verdict, and then directed a verdict of his own, upon which he entered judgment. These last two acts he had no power to do. *Slocum* v. *N. Y. Life Ins. Co.* * * * His only lawful conclusion upon setting aside the verdict was to set the cause down for a new trial. * * * Had he let the verdict stand and directed judgment in spite of it, we might perhaps have reversed the judgment and entered the original judgment upon the verdict, which in that case would have stood throughout. *Hoffman* v. *American Mills Co.* (C. C. A.), 228 F. 768. *Had his judgment of nonsuit been right, we might perhaps have affirmed it, though he had set aside the verdict.*" (Italics ours.)

The *Slocum* case is further distinguishable from the instant case in that here the trial court, without objec-

tion, *reserved decision* of petitioner's motions to dismiss until *after* the verdict had been rendered, while in the *Slocum* case defendant's motion for a directed verdict was *denied before* the issue went to the jury.

The District Court had constitutional power to *grant* the petitioner's motion despite the verdict, if the decision of the Circuit Court of Appeals for the Second Circuit in *Royal Card & Paper Co.* v. *Dresdner Bank* (27 F. (2d) 791) is a correct exposition of the law. In that case, a motion for a non-suit was made by defendant and the trial judge reserved decision until after a verdict for the plaintiff, when the motion was granted and the complaint dismissed upon the merits. On appeal, it was held that although a dismissal upon the merits was not permissible, there was no error in disregarding the verdict and granting a dismissal *without prejudice*. The judgment below was accordingly modified.

Identical procedure was upheld as constitutional in *Italian Star Line, Inc.* v. *United States Shipping Board Emergency Fleet Corporation* (53 F. (2d) 359). This was a tort action. At the trial a motion to dismiss the complaint had been made at the close of the plaintiff's case and again at the end of the entire case, and decision thereof had been reserved until after a verdict in plaintiff's favor. The trial court then set the verdict aside and dismissed the complaint for failure of proof. It was expressly urged by the plaintiff "that under the doctrine of *Slocum* v. *New York Life Insurance Co.* * * * the trial court had no power to dismiss the complaint after the jury had returned a verdict for the plaintiff; that the most which could be done was to set aside the verdict and declare a new trial" (pp. 359-360).

In the Circuit Court of Appeals for the Second Circuit, it was held that the procedure followed by the District

Court would be authorized in the Courts of New York State (New York Civil Practice Act, Sec. 459; *Bail* v. *New York, New Haven and Hartford Railroad Co.*, 201 N. Y. 355, 94 N. E. 863; *Fitzgerald* v. *Colt-Stewart Motor Co.*, 231 App. Div. 176); and that the State practice had been properly adopted under the Conformity Act (Revised Statutes, Sec. 914 [28 United States Code Annotated, Sec. 724]). Judge Swan, writing for a unanimous bench, then stated (p. 360):

> "The propriety of setting aside the verdict and passing upon the motion under such circumstances has been recognized by this Court in *Royal Card & Paper Co.* v. *Dresdner Bank*, 27 F. (2d) 791. *The Slocum Case has no application to such a situation. There is no violation of the right to trial by jury in dismissing a complaint for failure to establish a cause of action.* (*Bohenik* v. *Delaware & Hudson Co.*, 49 F. (2d) 722.)" (Italics ours.)

The comment of Trial Judge Coxe in passing upon the motions to dismiss after verdict, is pertinent. Said he (41 F. (2d) 382, at 384):

> "I find nothing in *Slocum* v. *N. Y. Life Insurance Co.* * * * to conflict with the practice followed in this case. It is not at all unusual in this district to reserve decision, on consent of the parties, on motions to dismiss until after the verdict of the jury. And I can see no illegality or impropriety in such procedure. *The motion raises only a question of law, and the decision thereon is in no way a usurpation of the functions of the jury.*" (Italics ours.)

In the case at bar, the Circuit Court of Appeals was asked simply to direct the District Court to do what, according to these precedents, it had the undoubted power

to do and should have done. The Seventh Amendment is equally restrictive upon all courts, trial and appellate. (*Pedersen* v. *Delaware, Lackawanna & Western R. R.*, 229 U. S. 146, 153.) If the lower court could have dismissed despite the verdict, surely it is only logic to conclude that the Circuit Court of Appeals may direct a dismissal erroneously denied. In doing so, it would be called upon to review, not facts tried by a jury, but only a preliminary question of law necessarily decided by the trial judge in denying the motions to dismiss (*Pennsylvania Railroad Co.* v. *Chamberlain*, 288 U. S. 333, 343; *Pleasants* v. *Fant*, 22 Wall. 116, 120-121).

Mr. Justice Van Devanter, who wrote the prevailing opinion in the *Slocum* case, said, in *Swift & Co.* v. *Johnson* (138 Fed. 867, 874-875):

> "In the federal courts, when the evidence upon a question of fact is so clearly preponderant or of such a conclusive character that the court would be bound, in the exercise of a sound judicial discretion, to set aside a finding in opposition to it, it is the duty of the court to withdraw the question from the jury and direct their finding; and thus, *before the question of fact is submitted to the jury, a preliminary question of law always arises for the decision of the court, and that question is not whether there is literally no evidence, but whether there is any substantial evidence, the consideration of which is properly within the province of the jury*" (citing numerous decisions of this and lower Federal Courts). (Italics ours.)

Clearly, when an Appellate Court corrects an erroneous decision of this preliminary question by the trial judge, the error corrected is the error of the court, not the jury. The province of the jury is not invaded. Such procedure in no wise contravenes the Seventh Amendment.

This view was entertained, at least impliedly, by the Circuit Court of Appeals for the Second Circuit in *Hoffman* v. *American Mills Co.* (288 Fed. 768, certiorari denied, 263 U. S. 701). Upon the trial of that case, the Court submitted the issues to the jury, reserving decision of a motion to dismiss the complaint. After verdict in the plaintiff's favor, the complaint was dismissed, but the verdict itself permitted to stand. The trial judge stated that if he were wrong, the Appellate Court might direct judgment on the verdict and thus avoid a new trial.

The Circuit Court of Appeals reviewed the dismissal of the complaint, and finding it erroneous, directed judgment upon the verdict. It said (p. 773):

> "We think it would not be a breach of the Seventh Amendment of the federal Constitution to order the verdict reinstated. In *Slocum* v. *New York Life Ins. Co.*, * * * the verdict was set aside and judgment directed, dismissing the complaint. This was held to be in violation of the Seventh Amendment. But in the case at bar, the court expressly refused to set aside the verdict. The right of jury trial was therefore accorded the defendant *and our determination here in no wise re-examines the facts tried by the jury.*" (Italics ours.)

If the Circuit Court of Appeals had *upheld* the dismissal below as *proper*, would it, in any greater sense have "re-examined the facts tried by the jury?" Or, if the dismissal below had been erroneously denied and the Circuit Court of Appeals had corrected the error by directing such dismissal, would its determination have involved a re-examination of "the facts tried by the jury?" These questions answer themselves. In the case cited the appellate court asserted and exercised its power to review the disposition by the trial court of a motion to dismiss the

complaint decided after verdict for the plaintiff and to direct judgment accordingly. Yet it refused to do this very thing in the case at bar.

The practice which petitioner urged for adoption by the Circuit Court of Appeals for the Second Circuit has been employed in the Sixth and Eighth Circuits. In *Knight* v. *Illinois Central Railroad Co.* (180 Fed. 368), suit was brought in the United States Circuit Court for the Western District of Kentucky to recover damages for death through negligence. At the close of the evidence the trial judge directed a verdict for the defendant and judgment was entered thereon, the Court refusing to permit the plaintiff to submit to non-suit. The Circuit Court of Appeals for the Sixth Circuit held the plaintiff was entitled to submit to non-suit, and accordingly reversed the judgment. In so doing, it said (p. 374):

> *"The practice, however, does not require a new trial, but only a direction that upon the setting aside of the judgment the plaintiff's motion to dismiss without prejudice be sustained. Vertrees* v. *Newport News, etc. R. R. C.*, 95 Ky. 318, 25 S. W. 1; *Francisco* v. *Chicago & Alton Ry. Co.* (8th Circuit), 149 Fed. 354, 360, 79 C. C. A. 292." (Italics ours.)

Similar procedure was followed by the Circuit Court of Appeals for the Eighth Circuit in *Francisco* v. *Chicago & A. R. Co.* (149 Fed. 354). This was a suit instituted in the Circuit Court of the United States for the Eastern District of Missouri to recover damages for wrongful death. At the close of the evidence, the trial court instructed the jury to return a verdict for the defendant; but before the jury retired, plaintiff requested and was granted permission to take an involuntary non-suit. Subsequently, the plaintiff moved to set aside this judgment of non-suit and prayed

a new trial. The motion was denied, and from this order plaintiff appealed. The Circuit Court of Appeals upheld the procedure below in all respects, but finding that the judgment was so worded as to appear to be a judgment on the merits, said (p. 360):

> "For this reason alone the judgment will be reversed, the defendant in error will recover its costs in this court, and the case will be remanded to the Circuit Court, *with directions to render a judgment that the action be dismissed without prejudice to the right of the plaintiff to maintain another for the same cause, and that the defendant recover its costs of the plaintiff, and it is so ordered.*"

It is significant that in neither of these cases was it even suggested that the direction of a non-suit, without prejudice, infringed any constitutional right.

Concededly, in actions at law tried before a jury, if it appears upon appeal that, although the judgment appealed from was erroneous, there remains an issue of fact to be determined before the proper judgment can be rendered, a new trial must be ordered so that the disputed question may be decided by the jury. So much is required by the Seventh Amendment. This is the precise holding of the *Slocum* case. But it is submitted, that in cases wherein, as here, the trial court should have disposed of the case without submitting it to the jury at all, either by dismissing the complaint or by directing a verdict, the appellate court should be empowered to direct the entry of the judgment which the trial judge should have ordered, without the useless formality, delay and expense involved in remanding the case for a new trial of a non-existing issue.

SECOND POINT.

The decision of the Circuit Court of Appeals is contrary to the strictly limited interpretation placed upon the *Slocum* case by subsequent decisions of this Court and lower federal tribunals.

The *Slocum* case was decided over twenty years ago. Four justices dissented. The vigorous minority opinion was rendered by the present Chief Justice. Of the other members of this Court as then constituted, but one remains. We feel justified in saying that lesser Federal Courts are looking to this tribunal, as presently constituted, for a salutary limitation of, if not a departure from, the technical common law formalism read into the Constitution by the *Slocum* case. This very hope was expressed by the District Court of the United States for the District of Minnesota, in *Glynn* v. *Krippner* (47 F. (2d) 281, at 283):

> "It seems to me very probable that the Supreme Court of the United States as now constituted is unlikely to hold again that the constitution prohibits the granting of judgment notwithstanding the verdict.
>
> * * * * * * * * * *
>
> I hope that the Court of Appeals may see fit to certify the question of the right of a federal court to grant such judgment where the laws of the state permit that practice, to the Supreme Court of the United States for reconsideration."

In the same case, the Circuit Court of Appeals for the Eighth Circuit (60 F. (2d) 406, 409), admitted that "the dissenting opinion in the *Slocum* Case seems to us, as it seemed to the trial judge, convincing", but held that the particular question involved, having once been decided

by this Court, could not be certified for reconsideration; at the same time it pointed out (p. 410):

> "If, for any cause, the supreme court may wish to reconsider the question,—an application to that tribunal to cause the record in the present case to be certified up to it may afford the appellant the remedy he seeks. For this court there is nothing to do but to affirm the judgment on the authority of the case cited * * *."

Unfortunately, there is no record of such a petition for *certiorari* having been filed.

As recently as May 8, 1933, the *Slocum* case was severely criticized and rigidly limited to its precise facts by the District Court for the Southern District of New York in *Isaacson* v. *United States* (3 Fed. Supp. 350). There, the trial court denied defendant's motion for a directed verdict and submitted the issues to the jury, which subsequently reported its inability to agree. Thereupon it was directed to return a verdict for the defendant. Plaintiff then asked that the verdict be set aside and a new trial ordered, on the ground that the action of the court violated his rights under the Seventh Amendment.

In denying the motion, Judge Knox distinguished the *Slocum* case and continued (p. 351):

> "In addition, it should be noted that three justices of the Supreme Court concurred with the present Chief Justice, in dissenting from the decision in the *Slocum* case, and that the majority view has been subjected to vigorous attack by various textwriters. See Schofield, New Trials and the Seventh Amendment, 8 Ill. L. Rev. 287, 381, 465; Thorndike, Jury Trials in the United States Courts, 26 Harv. L. Rev. 732; Committee of the American Bar Association, Proceedings, 1913, XXXVIII, 561.

> *These factors are conducive to a narrow interpretation of the Slocum case, rather than to an extension of its doctrine to cover such a situation as is presented by the case at bar * * *. Common sense dictates that the labor and expense of a new trial should not have to be undergone merely because an erroneous ruling was made, where the court, upon further consideration, can correct such ruling.* In my opinion the Seventh Amendment, as applied in *Slocum* v. *New York Life Insurance Co., supra,* does not deprive the court of this power." (Italics ours.)

The construction given the Seventh Amendment by this court in the *Slocum* case, decided in 1913, and in *Gasoline Products Co., Inc.* v. *Champlin Refining Co.* (283 U. S. 494), decided in 1931, form a startling contrast. In the *Slocum* case this court held that the Seventh Amendment not only preserved the substance of the right to trial by jury, but as well the common law procedural rules governing the right. Discussing the clause: "and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law", it adopted the language of *Parsons* v. *Bedford* (3 Pet. 433), decided in 1830 (p. 378):

> "This is a prohibition to the courts of the United States to re-examine any facts tried by a jury *in any other manner.* The only *modes* known to the common law to re-examine such facts, are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable, or the award of a *venire facias de novo,* by an appellate court, for some error of law which intervened in the proceedings." (Italics ours.)

Again (p. 379), it approved unreservedly the holding of *Capital Traction Co.* v. *Hof* (174 U. S. 1, 13), decided in 1899 to the effect:

> "that, when a trial by jury has been had in an action

at law, in a court either of the United States or of a State, the facts there tried and decided cannot be re-examined in any court of the United States, *otherwise than according to the rules of the common law of England;* that by the rules of that law, no other *mode* of re-examination is allowed than upon a new trial, either granted by the court in which the first trial was had or to which the record was returnable, or ordered by an appellate court for error in law; and therefore that, unless a new trial has been granted *in one of those two ways,* facts once tried by a jury cannot be tried anew, by a jury or otherwise, in any court of the United States." (Italics ours.)

Finally, this Court itself concluded (pp. 379-380):

"These decisions make it plain, first, that the action of the Circuit Court of Appeals in setting aside the verdict and assuming to pass upon the issues of fact and to direct a judgment accordingly must be tested *by the rules of the common law.*" (Italics ours.)

Contrast this interpretation with that contained in *Gasoline Products Co., Inc.* v. *Champlin Refining Co.* (283 U. S. 494). There the jury returned a verdict for the plaintiff. The Court of Appeals reversed because of errors in the charge of the trial court as to the measure of damages. In directing a new trial, however, it restricted the issues to the determination of damages only. It was contended that this procedure constituted a denial of the right to trial by jury, and more specifically, that, since by the rules of the common law, there could be no new trial of a part only of the issues of fact, a resubmission to the jury of the issue of damages alone, was denial of the trial by jury which the Seventh Amendment guarantees.

Mr. Justice Stone dealt with this contention, as follows (pp. 497-498):

> *"It is true that at common law there was no practice of setting aside a verdict in part.* If the verdict was erroneous with respect to any issue, a new trial was directed as to all. * * *
>
> Lord Mansfield, in applying the common law rule where the verdict, correct as to one issue, was erroneous as to another, said: "* * * for form's sake, we must set aside the whole verdict * * *" *Edie* v. *East India Co.*, 1 W. Bl. 295, 298. *But we are not now concerned with the form of the ancient rule. It is the Constitution which we are to interpret; and the Constitution is concerned, not with form, but with substance.* All of vital significance in trial by jury is that *issues of fact* be submitted for determination with such instructions and guidance by the court as will afford opportunity for that consideration by the jury which was secured by the rules governing trials at common law * * *. *Beyond this the Seventh Amendment does not exact the retention of old forms of procedure."* (Italics ours.)

The Court referred to the *Slocum* case and used language strictly limiting that decision to the precise situation there presented (p. 499). It said that the *Slocum* case

> "decided *only* that an appellate federal court may not direct judgment *non obstante veredicto, solely* because the verdict given is not sustained by the evidence, but *in that event* must order a new trial. There it was held that the Seventh Amendment does not permit the entry of judgment on a trial at law before a jury *upon an issue of fact,* without the verdict of the jury." (Italics ours.)

It is submitted that this Court has thus cast aside the narrow and technical construction given by the *Slocum* case to the Seventh Amendment which, for two decades,

has clothed that constitutional provision with all the cumbersome trappings of an ancient code of civil procedure, to the notorious impairment of substantial right, and which has compelled our Federal courts, against their rebellious common sense, to apply to modern law-suits a tortuous machinery invented centuries past. We ask that this Court apply an enlightened and liberal constitutional philosophy to the case at bar.

While the precise holding of the *Slocum* case need not be overruled on this appeal, that decision may at least be rigidly limited to the narrow confines of the situation there presented, which, as we have pointed out, is substantially different from that obtaining in the instant case.

THIRD POINT.

The *dictum* of the *Slocum* decision that compulsory non-suits were unknown to the common law and therefore not permitted in Federal courts under the Seventh Amendment, should not be adopted as a rule of law by this Court.

The majority opinion in the *Slocum* case states (p. 392):

> "A nonsuit at common law was a dismissal of the plaintiff's action without an adjudication, other than the imposition of costs, and constituted no bar to another action for the same cause * * *. But unless he assented to being non-suited on the evidence it was essential that a verdict be taken, even although it was certain to be against him. In other words, such a nonsuit was always voluntary, and never compulsory."

The Court then concludes (p. 394):

> "It being thus certain that the common law rules in respect of nonsuits recognized that the plaintiff had a right to have the verdict of the jury taken,"

it follows that the Seventh Amendment, perpetuating as it does the common law modes of procedure, does not permit a compulsory nonsuit in either trial or appellate courts of the United States.

1. *The dictum is contra to controlling decisions of this Court which have been followed and applied by lower Federal courts.*

As previously suggested (*infra*, p. 5), this Court has expressly held that a compulsory nonsuit for failure of proof may be directed by a District Judge pursuant to a local territorial statute without violation of the Seventh Amendment. *Coughran* v. *Bigelow* (164 U. S. 301). This decision anticipated and effectually answered the *dictum* of the *Slocum* case that compulsory nonsuits were unwarranted at common law. Referring to the earlier decisions of this Court in *Elmore* v. *Grymes* (1 Pet. 469); *Crane* v. *Morris* (6 Pet. 598), and *Castle* v. *Bullard* (23 Howard 172), holding that a Federal trial court had no authority to order a peremptory nonsuit against the will of the plaintiff, Mr. Justice Shiras, writing for a unanimous bench, remarked that those cases "were based, *not upon the constitutional right of a plaintiff to have the verdict of a jury, even if his evidence was insufficient to sustain his case, but upon the absence of authority, whether statutory or by a rule promulgated by this court;*" and, as warrant for this view, the learned justice points to *Central Transportation Co.* v. *Pullman's Palace Car Co.*, 139 U. S. 24, wherein "a judgment of the Circuit Court of the United States for the Eastern District of Pennsylvania, ordering a peremptory nonsuit, in pursuance of a state statute, was upheld."

These decisions have never been overruled, but on the contrary, have been consistently adhered to and applied by lower Federal courts throughout the nation. *Boudrot* v. *Cochrane Chemical Co.*, 110 Fed. 919; *Priestly* v. *Provi-*

dent Savings Co., 112 Fed. 271; *Gentry* v. *Singleton*, 128 Fed. 679; *Chicago & Northwestern Railway Co.* v. *Andrews*, 130 Fed. 65; *Swift & Co.* v. *Johnson*, 138 Fed. 867; *Huntt* v. *McNamee*, 141 Fed. 293; *Parks* v. *Southern Railway Co.*, 143 Fed. 276; *Fadley* v. *Baltimore & Ohio R. Co.*, 153 Fed. 514; *Knight* v. *Illinois Central R. Co.*, 180 Fed. 368; *Russo-Chinese Bank* v. *National Bank of Commerce*, 187 Fed. 80; *Board of Comm'rs of City & County of Denver* v. *Home Savings Bank*, 200 Fed. 28; *Shank* v. *Great Shoshone & Twin Falls Water Power Co.*, 205 Fed. 833; *Neil Bros. Grain Co.* v. *Hartford Fire Ins. Co.*, 1 F. (2d) 904; *Burden et al.* v. *Robertson*, 7 F. (2d) 266; *Stapleton* v. *Reading Co.*, 26 F. (2d) 242; *Julius Klugman's Sons, Inc.* v. *Oceanic Steam Navigation Co.*, 42 F. (2d) 461; *Ellerson* v. *Grove et al.*, 44 F. (2d) 493; *Dulion* v. *S. A. Lynch Enterprise Finance Corporation*, 53 F. (2d) 568; *McNabb* v. *Virginian Ry. Co.*, 55 F. (2d) 137; *MacLachlan* v. *Perry*, 68 F. (2d) 769.

Of these cases, the following deserve special attention: *Shank* v. *Great Shoshone & Twin Falls Water Power Co.* (205 Fed. 833), in which the Circuit Court of Appeals, Ninth Circuit, decided that a compulsory nonsuit was proper in a Federal District Court, if permitted by local state practice; *Stapleton* v. *Reading Co.* (26 F. (2d) 242), wherein the Third Circuit Court of Appeals affirmed a compulsory nonsuit granted by the District Court for the District of New Jersey; *Fadley* v. *Baltimore & Ohio R. R. Co.* (153 Fed. 514), which affirmed a compulsory nonsuit granted by the District Court for the Western District of Pennsylvania; *Neil Bros. Grain Co.* v. *Hartford Fire Ins. Co.* (1 F. (2d) 904), in which the Ninth Circuit Court of Appeals affirmed an order of judgment for the defendant entered by the District Court for the Eastern District of Washington; and *Dulion* v. *S. A. Lynch Enterprise Finance Corporation*, (53 F. (2d) 568), wherein the Fifth Circuit

Court of Appeals affirmed a compulsory nonsuit granted by the District Court in Georgia under a Georgia statute authorizing such trial procedure. Authorities in the Second Circuit have been previously discussed (*infra*, p. 7).

In *Parks* v. *Southern Ry. Co.* (143 Fed. 276), at the conclusion of plaintiff's case, the defendant moved for a directed verdict. The motion was argued and was then granted by the trial judge. Thereupon, plaintiff asked leave to take a *voluntary nonsuit*, which the court *declined to permit*. Its refusal was assigned as error. The Circuit Court of Appeals, Fourth Circuit held (p. 277):

> "that under the circumstances it was within the discretion of the court to either permit the plaintiff to take a non-suit or to direct a verdict in favor of the defendant in error."

The reason and policy behind the rule was thus stated (pp. 279-280):

> "It is highly important that the court in the exercise of its discretion should not only see that equal and exact justice is done between litigants, but it is equally important that needless litigation should be speedily determined, and in the trial of cases the court should consider the rights of the defendant as well as those of the plaintiff, and where it appears that all the evidence which it is possible to obtain has been offered and the case has been submitted to the jury or to the court it is the duty of the court, if in its opinion the evidence is not sufficient to justify a verdict in favor of the plaintiff, to direct the jury to return a verdict in favor of the defendant. The courts are not organized for the purpose of permitting the plaintiff in an action to experiment with a certain state of facts for the purpose of ascertaining the opinion of the court as to the law

> applicable to the same and then permit him to withdraw from the scene of conflict and state a new cause of action and mend his licks in another direction. Such policy, if adopted, would be productive of much mischief, and should not be tolerated."

It is noteworthy that the element stressed in this case, was not the right of the plaintiff to take a voluntary nonsuit and sue again, but the right of the defendant, *over plaintiff's objection*, to insist upon a binding adjudication of the merits and a termination of the litigation.

In the light of these precedents it is improper to say that a compulsory nonsuit is not permissible in Federal courts under the Seventh Amendment; and it is respectfully submitted that the settled rules of practice which have thus become so deeply imbedded in our Federal judicial procedure should not be abandoned for a mere *dictum* of doubtful validity.

2. *Adoption of the dictum as law will introduce patent inconsistency into the rules of Federal Trial Procedure.*

It is conceded by the majority in the *Slocum* case that a Federal Trial Judge has power to direct a verdict when a contrary verdict would be set aside; and this, even though there may be technical issues of fact presented by the pleadings, provided there is no evidence upon which the jury can properly find a different verdict than that directed. *Pleasants* v. *Fant*, (22 Wall. 116, 120); *Pennsylvania R. R. Co.* v. *Chamberlain* (288 U. S. 333, 343).

Now the doctrine that federal courts have no power to nonsuit a plaintiff without his consent for want of evidence to support his case, and the established rule that federal courts have power, without the consent of the plaintiff, to direct a verdict for the defendant on a material issue of fact, when the plaintiff's evidence is not enough to support his case, are hopelessly irreconcilable. To deny the one power and affirm the other seems to be inconsistent.

In speaking of involuntary nonsuits and directed verdicts, Mr. Justice Field, in *Oscanyon* v. *Arms Co.* (103 U. S. 261, 264), said:

> "The difference in the two modes is rather a matter of form than of substance, except in the case of a nonsuit, a new action may be brought, whereas in the case of a verdict the action is ended, unless a new trial be granted either upon motion or upon appeal."

A fact found by a peremptorily directed verdict cannot be a "fact tried by a jury" within the meaning of the Seventh Amendment; and it is strange to say that the verdict of a jury returned in passive obedience to the compulsion of a trial judge constitutes *their* determination of the issues presented either by the pleadings or the evidence.

If the court may thus take a case away from the jury, and, with their purely mechanical cooperation, decide the issues himself, without violating the Seventh Amendment, it is illogical to say that he may not direct a compulsory nonsuit for failure of proof.

Indeed, under the Seventh Amendment, a compulsory nonsuit, which leaves the merits undecided and the plaintiff free to sue again, does not seem as objectionable as a directed verdict, which determines the merits and precludes further litigation.

It is equally inconsistent to bar nonsuits in Federal Courts, because unknown to the common law, and at the same time to permit directed verdicts in those tribunals under the Seventh Amendment. It is settled that the "common law" referred to in the Seventh Amendment is the common law of England, and not the common law of any State or of all the States (*United States* v. *Monson*, 1 Gall. 5, 20). By the common law of England is meant so much of that common law as prevailed at the time the Seventh

Amendment was proposed by Congress, September 25, 1789, and declared in force, December 15, 1791 (Warren, History of the American Bar; 1, Select Essays on Anglo-American History, 367).

The practice of moving the trial judge for a directed verdict on a material issue of fact did not become familiar practice in the English Courts until *after* the proposal and adoption of the Seventh Amendment.

Thus, in *Gibson* v. *Hunter*, (2 H. Bl. 187), decided in 1793), Lord Eyre said (p. 205):

> "The admissibility of the evidence being established, the question *how far* it conduces to the proof of the fact which is to be ascertained, is not for the judge to decide, but for the jury exclusively; with which judges interfere in no case, but where they have in some sort substituted themselves in the place of the jury in attaint upon motions for new trials."

As late as 1824, in *Bulkeley* v. *Butler* (2 B. & C. 434), on error to the Common Pleas, and 1826, in *Viner* v. *Corporation of Reading* (1 Y. & J. 4), on error to the King's Bench, the practice of moving the trial judge for a directed verdict on a material issue of fact was sustained, but evidently was regarded as novel and doubtful.

In 1794, the charge of Jay, *C. J.*, to the jury in *Georgia* v. *Brailsford* (3 Dallas 1)—a jury trial in the Supreme Court under its original jurisdiction—indicates that none of the members of that Court as then constituted knew of the practice of directing a verdict on a material issue of fact.

The practice of directing a verdict in Federal courts was not definitely sustained until 1850 in *Parks* v. *Ross*, (11 How. 362, 373); and the last attack upon the practice was made in *Pleasants* v. *Fant* (22 Wall. 116) in 1874.

If, under the Seventh Amendment, Federal courts are to be rigidly restricted to the "rules of the common law" prevailing at the time of its adoption, directed verdicts must be barred as unconstitutional. At least, consistency compels either the condemnation or approval of *both* compulsory non-suits and directed verdicts under the Seventh Amendment; it does not permit choice between the two.

If for no other purpose than that of consistency, therefore, compulsory non-suits should be held permissible under the Seventh Amendment; and the contrary *dictum* of the *Slocum* case may be explicitly disapproved.

3. *The dictum has no substantial foundation in the Common Law.*

In reaching its conclusion that a compulsory nonsuit was not allowable at common law, the majority in the *Slocum* case point to the fact that unless a party "assented to being non-suited on the evidence it was essential that a verdict be taken, even though it was certain to be against him. In other words, such a compulsory non-suit was always voluntary, and never compulsory" (pp. 392, *et seq.*).

In this connection, it must be remembered that as early as 1665, the English courts were clothed with judicial power to grant a new trial after a false verdict against the weight of the evidence (*Bright* v. *Enyon,* 1 Burrow 390, 394, 3 Bl. Com. 388). This procedure succeeded the old writ of attaint, whereby a jury of twenty-four re-examined the verdict returned by a jury of twelve, and, if found false, the verdict of the twenty-four was substituted in its place. In 1757 Lord Mansfield said: "The writ of attaint is now a mere sound in every case" (*Bright* v. *Enyon,* 1 Burrow 390, 394; 3 Black. Com. 388).

Thus, before the proposal and adoption of the Seventh Amendment, and at least since 1757, the remedy of attaint for a false verdict had given way to the motion for a new

trial on the specific ground that the verdict was false and against the weight of the evidence.

It is thus apparent that the consent of the plaintiff to a non-suit at common law was a mere fiction. For, in view of the trial court's power to grant a new trial when, in his opinion the verdict was against the weight of the evidence, only a foolhardy plaintiff would insist on the verdict of the jury, for him or against him, when the trial judge strongly recommended consent of the plaintiff to a non-suit for want of evidence to support his case. If the plaintiff happened to win a verdict, it was certain the Court would order a new trial. If, on the other hand, the verdict favored the defendant, the plaintiff was concluded upon the merits and forever denied the opportunity of another day in court (*cf.* Schofield, New Trials and the Seventh Amendment, 8 Ill. Law Review 305).

It is undeniable that when the Seventh Amendment was proposed and adopted, a plaintiff in an English Court did have the technical common law "right" to the verdict of a jury, for him or against him, even though his case was devoid of a scintilla of evidence to sustain it. But, the question arises: Should this so-called common law "right" of a stubborn plaintiff to a jury verdict, be made the standard and measure of the constitutional right to trial by jury in the Federal courts under the Seventh Amendment? This Court has correctly answered in the negative (*Coughran* v. *Bigelow*, 164 U. S. 301).

FOURTH POINT.

The District Court erroneously denied petitioner's motions to dismiss the complaint for lack of proof.

In the ensuing consideration of the record, we have omitted extended discussion of the fact that the respondent's version of the alleged accident was *wholly uncor-*

roborated, inherently unconvincing (R., pp. 61-118, fols. 78-126, 127-144), and *actually contradicted* in important particulars by the Chief Officer (R., pp. 36-61, fols. 50-77) and Chief Steward (R., pp. 187-197, fols. 230-241); and the fact that the respondent, by his own conduct and his contradictory statements to petitioner's representative (R., pp. 264-268, fols. 326-332; Deft.'s Exhs. B and C), and to the physicians in the hospital to which he was confined (R., p. 16, fol. 25; pp. 148-149, fols. 182-184; p. 151, fol. 186) discredited completely his story on the witness stand. These phases of the evidence have been so fully dealt with in the prevailing opinion below, (70 F. (2d) 635-638) that we have not discussed them here. Discussion has been restricted to the conceded and uncontradicted facts and to the medical testimony of both parties, because it is felt that in the light thereof no triable issue of fact was presented for the jury to determine.

1. *The conceded and undisputed facts.*

The following salient features of this case are to be noted:

1. The *conceded fact* that respondent's injuries, if sustained at all, occurred on *February 13, 1930* (R., p. 65, fol. 82).

2. The *conceded fact* that respondent was received at the hospital on *February 21, 1930* (R., p. 269, fol. 333; Deft.'s Exh. D).

3. The *conceded fact* that respondent was *syphilitic* (R., p. 15, fol. 23).

4. The *uncontradicted testimony* that respondent was *alcoholic* (R., p. 148, fol. 183).

5. The *uncontradicted hospital finding* that upon his admission to the hospital, respondent was afflicted with *syphilitic degeneration of the arteries* (R., p.

16, fol. 24; p. 19, fol. 28; pp. 159-160, fols. 196-198; pp. 220-221, fols. 268-269; pp. 234-235, fol. 285).

6. The *uncontradicted hospital finding* that, upon admission to the hospital respondent's left foot had become affected with a *dry gangrene* (pp. 18-19, fols. 28-29; pp. 151-153, fols. 186-188; p. 219, fol. 267; p. 231, fol. 281).

7. The *conceded fact* that respondent bathed his foot in *hot water* on February 13, 1930 (R., p. 68, fol. 85; pp. 84-88, fols. 105-109); and, on the evening of February 14, 1930, *walked* the streets of Brooklyn until midnight (R., pp. 71-72, fols. 89-90); pp. 93-94, fols. 114-116; pp. 189-193, fols. 233-237).

8. The *unanimous and uncontradicted hospital* opinion that the dry gangrene, necessitating amputation, developed spontaneously from systemic, syphilitic degeneration of the arteries,—endoarteritis,—which may have been precipitated by either the application of hot water or exposure to dampness and cold (R., p. 16, fol. 24; p. 19, fol. 28; p. 152, fol. 187; pp. 160-161, fols. 197-199; pp. 220-221, fols. 268-269; pp. 234-235, fols. 285-286).

9. The fact that Dr. Newstadter, respondent's own expert, *conceded* that the hospital theory of causation is medically competent (R., p. 126, fol. 155; p. 132, fol. 161).

2. *Respondent's own medical testimony failed to show any causal connection between the alleged injury and the amputation.*

To establish his theory of causation, respondent called as witnesses two physicians: Dr. Wikle and Dr. Newstadter. Dr. Wikle was a member of the hospital staff at the time of respondent's confinement there and actually

observed and treated his condition (R., pp. 12-13, fols. 19-22). Dr. Newstadter never treated respondent, and examined him for the first time on January 30th and 31st, 1933, two years after the alleged injury, and long after respondent's leg had been amputated (R., p. 119, fol. 145). The examination was made at the request of respondent's counsel, for the purpose of giving expert testimony at the trial (R., p. 126, fol. 154).

Dr. Wikle's testimony is *uncontradicted* and therefore, *conclusive* upon the respondent, whose witness he was, regarding the following *matters of fact:*

1. Respondent's foot was affected with a *dry* gangrene (R., pp. 18-19, fols. 27-28; p. 29, fol. 41).

2. There was no evidence of a wound or traumatic injury of any kind anywhere on respondent's foot when Dr. Wikle examined it on February 22, 1930, *nine* days after such an injury is alleged to have occurred (R., p. 16, fol. 25; p. 18, fol. 27).

3. A periarterial sympathectomy was performed on the main artery of the left thigh by Dr. Wikle on February 24, 1930 (R., p. 13, fol. 22).

4. The left leg was not amputated until April 17, 1930, *two months* after the alleged injury (R., p. 14, fol. 23).

Respondent's witness, Dr. Wikle, is *confirmed* and *substantiated* by respondent's expert, Dr. Newstadter, with regard to the following *matters of professional theory:*

1. A wound such as respondent described, an inch and a half long, sufficient to produce infectious gangrene would be visible within *ten days,* or even *two weeks* after it had occurred (Wikle, R., pp. 16-18, fols. 25-27; p. 29, fol. 41; Newstadter, p. 135, fol. 165; p. 137, fol. 167).

2. The absence of such a wound within *ten days* or *two weeks* after it had been inflicted would indicate, that *even though sustained, it had not produced* the subsequent gangrene and that some *other cause* had produced it (Wikle, R., p. 23, fol. 34; p. 36, fol. 49; Newstadter, p. 135, fol. 165).

3. A periarterial sympathectomy is *never* performed in cases of gangrene resulting from a *wound infection* (Wikle, R., pp. 19-20, fols. 29-30; Newstadter, pp. 130-131, fols. 159-160).

4. In cases of gangrene resulting from a *wound infection*, amputation is *immediately imperative* to save life, and delay in amputating is fatal (R., p. 133, fol. 162).

5. Dry gangrene is produced by syphilitic arthritis, or syphilitic endo-arteritis *spontaneously* without requiring the infliction of any external injury (Wikle, R., pp. 18-19, fols. 27-29; p. 25, fol. 26; Newstadter, p. 128, fol. 155).

The dogmatic assertion of Dr. Newstadter, in answer to a hypothetical question, *which did not inform him that the gangrene was dry,* that gangrene may be produced by wound infection as a competent producing cause (R., pp. 119-121, fols. 146-149) may be disregarded.

As was said in *Noble* v. *C. Crane & Co.,* (169 Fed. 55, 59-60):

> "The conflict must be real, not merely apparent. A mere dogmatic assertion, which does not appeal to the reason of the Court, which does not have substance and relative consequence, which does not have fitness to induce conviction, *is not proof, even if uncontradicted* * * *." (Italics ours.)

We respectfully urge that, giving to the respondent the advantage of every inference that can properly be drawn

from the conceded and established facts, nevertheless the testimony of Doctors Wikle and Newstadter, respondent's witnesses, when taken together, not only fails to make out a *prima facie* case of responsibility against the petitioner, but indeed establishes that the dry gangrene requiring amputation did not result from a wound infection as a competent producing cause.

The respondent, therefore, should have been non-suited and the complaint dismissed at the close of his case.

A non-suit, under such circumstances, is permitted by the settled trial practice prevailing in the New York courts (*Kraus* v. *Birnbaum*, 200 N. Y. 130; *Colt* v. *Sixth Ave. R. R. Co.*, 49 N. Y. 671; *Ozagar* v. *Pierce Mfg. Co.*, 134 App. Div. 800; *Migel* v. *Heller Hirsch & Co.*, 151 App. Div. 637).

3. *At the close of the entire case, the evidence was simply overwhelming in favor of petitioner on the issue of proximate cause.*

I

Petitioner, as part of its case, called Dr. Perez, who first examined respondent upon his admission to the hospital, and transcribed into the hospital records respondent's history of the beginning and development of his malady (R., pp. 146-147, fols. 180-181); Dr. Charache, who attended respondent almost daily from his admission to, until his discharge from the hospital (R., pp. 216-217, fols. 263-264); and Dr. Shatara, who amputated respondent's left leg on April 17, 1930 (R., p. 233, fols. 283-284).

Dr. Perez, Dr. Charache, Dr. Shatara, all personally familiar with the facts, substantiated Dr. Wikle's diagnosis of the disease as *dry gangrene*. All of them confirmed Dr. Wikle's finding of *syphilis* (R., pp. 151-153, fols. 186-188; p. 219, fol. 267; p. 231, fols. 281).

All of them verified Dr. Wikle's statement that there

was *degeneration of the arteries and impairment of circulation.* Two of them, Dr. Charache and Dr. Shatara offered factual evidence of this when they testified that in performing the amputation there was so little bleeding that the usual tourniquet was dispensed with (R., p. 221, fol. 269, p. 233, fol. 284).

None of them, throughout their long connection with the case ever observed *a wound or traumatic injury of any kind to the affected foot,* and they confirmed Dr. Wikle again in this respect (R., p. 149, fol. 184; p. 219, fols. 266-267; p. 222, fol. 271; p. 232, fols. 282-283).

None of them ever heard respondent *complain* of such an injury. On the contrary, they are all positive that he told them he had suffered *a sudden pain in his left foot, had bathed it in hot water and had then developed dry gangrene* (R., p. 148, fols. 182-183; p. 151, fol. 186; p. 219, fol. 266; p. 220, fol. 268; pp. 234-235, fol. 285).

Dr. Perez and Dr. Shatara, the one house surgeon, the other Chief of the Surgical Staff at the Cumberland Hospital, subscribed without qualification to the doctrine announced by both Dr. Wikle and Dr. Newstadter that a *peri-arterial sympathectomy is never performed in cases of gangrene resulting from a wound* (R., p. 153, fol. 188; pp. 231-232, fol. 282).

Moreover, Dr. Perez and Dr. Shatara testified that in cases of wound-infectious gangrene *immediate amputation is imperative to save life.* In this they were upheld by respondent's own expert, Dr. Newstadter. It is undisputed that respondent's leg was not severed until April 17, 1930, more than *two months* after his admission to the hospital, and then, *not to save his life,* but simply to remove the useless limb. Had he been afflicted with a moist gangrene, this delay would have been fatal. The fact that he still lives despite the delay in amputation, explodes his contention that this was an infectious gangrene resulting

from trauma (R., p. 133, fol. 162; p. 153, fols. 188-189; p. 234, fols. 284-285).

Drs. Perez, Charache and Shatara all concur in distinguishing between the essential nature of *dry* and *moist* gangrene. Unanimously, they affirm Dr. Wikle's opinion that dry gangrene *never* results from traumatic injury as a competent producing cause; and all agree that the dry gangrene observed by them *did not* and *could not* have resulted from a nail injury (R., p. 162, fols. 199-200; pp. 222-223, fol. 271; pp. 232-233, fols. 282-283).

They go further and constructively assign a cause. They all diagnose the case a *dry gangrene, spontaneously produced by endo-arteritis, or syphilitic degeneration of the arteries, with or without a possible precipitation by exposure to heat or cold.* Dr. Newstadter, petitioner's expert, concedes that this medical theory is not impossible. The theory itself accords with the established facts (R., pp. 32-34, fols. 45-47; p. 227, fol. 277; pp. 234-235, fol. 285).

With the proof in this state, the trial court should have dismissed the complaint (*Kraus* v. *Birnbaum*, 200 N. Y. 130; *Colt* v. *Sixth Avenue R. R. Co.*, 49 N. Y. 671; *Cragar* v. *Pierce Mfg. Co.*, 134 App. Div. 800; *Migel* v. *Heller Hirsch & Co.*, 151 App. Div. 637; *Grace* v. *Fassoit*, 67 App. Div. 443).

Under the settled New York Practice a dismissal *on the merits* would have been proper. "A dismissal of a a complaint * * * at the close of the plaintiff's * * * evidence, or a dismissal of the complaint * * * at the close of the whole evidence, is a final determination of the merits of the cause of action * * * unless the court shall dismiss without prejudice" (*New York Civil Practice Act*, Section 482). Under the Conformity Act, a Federal District Court sitting in New York may do likewise unless forbidden by the Seventh Amendment (Revised Statutes, Section 914; 28 United States Code Annotated, Section 724).

If what has heretofore been said is correct (Points I-III), the Circuit Court of Appeals should have directed the dismissal which the District Court erroneously denied.

LAST POINT.

The judgment of the Circuit Court of Appeals should be modified by eliminating therefrom the requirement of a new trial and substituting therefor a direction to enter judgment dismissing the complaint.

Respectfully submitted,

GEO. WHITEFIELD BETTS, JR.,
Counsel for Petitioner,
120 Broadway,
New York City.

WILLIAM R. MEAGHER,
Of Counsel.